27 September 2006

Jumbunna Indigenous House of Learning
University of Technology, Sydney
PO Box 123 Broadway
NSW 2007 Australia

Ms Julie Dennett
Acting Secretary
Legal and Constitutional Committee
The Senate
Parliament House
Canberra ACT 2600

Dear Ms Dennett

Crimes Amendment (Bail and Sentencing) Bill 2006

Thank you for allowing the Jumbunna Indigenous House of Learning to comment on the *Crimes Amendment (Bail and Sentencing) Bill 2006* (Cth). We submit that the Bill in its present form should not be passed. We concur with the submission of the Law Council of Australia, in particular its assertion that the curtailment of judicial discretion is likely to result in injustice. Furthermore, we do not believe that the Bill will lead to a reduction in family violence, in the absence of a genuine commitment by all Australian Governments to addressing the underlying causes of dysfunction in Indigenous communities.

We endorse the Government's aim expressed in its second reading speech, to ensure that proper sentences are given to those who perpetrate family violence. However, we believe that the most effective means of achieving this goal is judicial education rather than legislative amendment.

The Bill was preceded by a number of highly publicised decisions in which Aboriginal men received lenient sentences for committing assaults against Aboriginal women and children. One of the mitigating factors taken into account in those cases was the belief by the offenders that their actions were condoned by customary law. We argue that in some of those cases the sentencing judges were provided with inadequate assistance from the parties in gaining a comprehensive understanding of customary law. Given that judges do not have an independent fact-finding role in the adversarial system this left some in an invidious position.

For example, in the case of *R v GJ*, the facts of which are now a matter of public record, the Crown accepted GJ's assertion that on the basis of his traditional upbringing he believed that the complainant was consenting to sexual intercourse, in spite of her objections. Consequently, the sentencing judge had little choice but to sentence GJ on that basis. In the weeks that followed, the sentencing judge, Chief Justice Martin, endured a barrage of public criticism. When the original sentence was subsequently increased by the Northern Territory Court of Criminal Appeal, Chief Justice Martin took the rare step of publicly conceding that his decision had been incorrect and affirmed his faith in the ability of the appeals system to correct such

errors in judgment. We believe that such courageous leadership is proof that curtailment of judicial discretion is unwarranted. However, the case suggests that the judiciary should receive further assistance in reconciling two vastly different legal systems.

Given that currently there are no Indigenous members of the judiciary and only a small number of Indigenous Magistrates and barristers, the opportunities for judges to gain a comprehensive understanding of customary law are limited. Consequently, the judiciary should be provided with appropriate and regular cross-cultural awareness training.

If you have any queries regarding this submission please contact either Larissa Behrendt or Nicole Watson on (02) 9514 9655.

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